

(§47.16, *infra*), the contestant's notary public served a subpoena duces tecum upon the Clerk, who refused to comply with it without permission of the House. The subpoena requested production of documents filed by the contestee in the dispute. The subpoena and accompanying papers were referred to the Committee on the Judiciary and ordered printed. The 73d Congress did not authorize the Clerk to respond to the subpoena.

§ 7. The Courts

Although the House is the final judge of the elections of its Members, candidates are frequently subjected to actions in state and federal courts for violations of laws regulating campaign practices, an area which Congress has largely left to the states. Beyond the scope of this chapter are injunctions against the issuance of election certificates⁽²²⁾ and suits by individuals such as those arising from violations of the 1965 Voting Rights Act, 42 USC §§1971 et seq., and court-ordered congressional redistricting.⁽¹⁾

22. See Ch. 8 §16.4, *supra*, for discussion of an instance wherein a state court had issued a preliminary injunction against the issuance of a certificate to a Member-elect, and the House referred the question of his right to be seated to a committee.

1. See *Wesberry v Sanders*, 376 U.S. 1 (1963) and kindred cases such as

This section takes up precedents involving (1) the necessity to appeal to state courts before the election to cure pre-election irregularities;⁽²⁾ (2) the acceptance of advisory opinions from state courts on the laws of that state;⁽³⁾ and (3) the binding effect of local court determinations.⁽⁴⁾

The House has stated that local magistrates lack authority to break open ballot boxes.⁽⁵⁾

Appeal to State Court Regarding Pre-election Irregularities

§ 7.1 A contestant must exhaust state law remedies by protesting pre-election irregularities to the state board of election, with appeal to the state courts, prior to the election, in order to overturn the results of that election on the basis of the pre-election irregularity.

Gray v Sanders, 372 U.S. 368 (1963) which invalidated the use of the "county unit" system of selecting party candidates. Generally, see Ch. 8, *supra*.

2. § 7.1, *infra*.

3. § 7.3, *infra*.

4. § 7.4, *infra*.

5. § 7.7, *infra*. The jurisdiction of the courts over the election of Members is more fully discussed in Ch. 8, *supra*.

In the 1951 Ohio contested election case of *Huber v Ayres* (§56.1, *infra*), the majority of the committee recommended dismissal of a contest on the basis that the contestant had failed to exhaust his state remedies first. The majority also suggested that discrimination against the contestant may have been due to the failure of the Ohio legislature to implement a constitutional provision calling for an equal rotation of the candidates' names in the different positions on the ballots. Although the minority disagreed with the majority conclusion, and further argued that the contestant had not been afforded a fair chance to discover the error before the election in order to take appropriate action, the House nevertheless approved a resolution dismissing the contest and seating the contestee.

§ 7.2 Contestant did not have to seek recourse to the highest state court to show that the Iowa election laws did not permit him a recount under state law.

In the 1957 Iowa contested election case of *Carter v LeCompte* (§57.1, *infra*), the elections committee expressly overruled the view of the committee in the 1940 election contest of *Swanson v Harrington* (§50.4, *infra*), in which

the contestant had been required to seek recourse to the highest state court in order to show that the Iowa election laws did not permit him to seek a recount. The committee adopted the opinion of the state attorney general as expressed in a letter to the Governor and secretary of state.

Advisory Opinions by State Courts

§ 7.3 A state supreme court, empowered to issue advisory opinions, advised a state Governor to issue a certificate of election to a contestee, based on the official canvass of votes, and that he had no authority to determine the validity of disputed ballots counted in that canvass.

In the 1958 Maine contested election case of *Oliver v Hale* (§57.3, *infra*), arising from the Sept. 10, 1956, election, a recount was conducted as permitted by state law with representatives present from the "Special Committee to Investigate Campaign Expenditures of the House of Representatives." The contestee requested that a certificate of election be issued to him, to which request the contestant objected. The Governor declined to issue such certificate pending receipt of an

advisory opinion from the Supreme Court of Maine. The supreme court advised that the Governor had no authority to determine the validity of disputed ballots, and that he should issue a certificate based on the official canvass of votes. Accordingly, the Governor and council issued the certificate of election to the contestee on Dec. 5, 1956.

Local Court Determinations as Controlling

§ 7.4 Where state law required county residence for a certain length of time as a qualification for registration, and no challenge of voters was made at the time of such registration or at the time of voting, a local court interpretation as to when residency commenced to run was regarded by the House elections committee as controlling.

In the 1951 New York contested election case of *Macy v Greenwood* (§56.4, *infra*), the contestee had received a plurality of only 135 votes over the contestant, who argued that 932 voters were not qualified as to residence for the reason that they had not satisfied the four-month county residency requirement under state law. According to the contestant, such pe-

riod should have begun when a voter actually moved into the district rather than on the date of signing a contract to purchase a house therein. The House committee, however, found that the local board of elections had relied, in their interpretation of the requirement, on a county court decision to the effect that the date of signing any such contract was determinative.

In expressing the view that the votes had been fairly tabulated, the committee found that no challenges were made under provisions of New York law which permitted challenging of voters at the time of registration and voting. Furthermore, the committee report stated that no instance could be found in which the House had rejected votes as illegal for the reason that the voter had not resided in the county for the statutory period of time. In recommending adoption of a resolution seating the contestee, the committee also noted that, "Had it found the votes illegally cast, the votes presumably would be deducted proportionally from both candidates, according to the entire vote returned for each."

The contest was subsequently dismissed by the House.

§ 7.5 A committee on elections stated that it was not bound

by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry, where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.

In *Kent v Coyle* (§46.1, *infra*), a partial recount was conducted by a state court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

Interpretation of Law Governing Nominations

§ 7.6 A committee on elections adopted a state court decision on the legality of the nomination of a party candidate, where petitioner, who had unsuccessfully sought such nomination for himself, filed a petition in the House against the candidate who had subsequently

defeated the nominee in the general election.

In *Lowe v Thompson* (§62.1, *infra*), a contest was dismissed and a petition denied where a state court suit challenging the alleged irregular nomination of the candidate opposing contestee had been dismissed.

Magistrates Lack Authority To Open Ballot Boxes

§ 7.7 A magistrate taking testimony in an election contest is not a person or tribunal authorized to try the merits of the contest and has no authority to order ballot boxes to be broken open.

In the 1949 Michigan contested election case of *Stevens v Blackney* (§55.3, *infra*), the committee majority cited early cases in the report quoting the "accepted uniform rule" that a magistrate taking testimony "was not a person or a tribunal authorized to try the merits of the election [contest] and had no authority under the law of Pennsylvania or of Congress to order those boxes to be broken open."